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OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9903

Cost Accounting Standards: Revision of the Exemption from Cost Accounting Standards for Contracts and Subcontracts for the Acquisition of Commercial Items

AGENCY: Office of Management and Budget (OMB), Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board.

ACTION: Proposed rule.

SUMMARY: The OFPP and CAS Board invite public comments concerning this proposed rule to clarify the exemption for contracts or subcontracts for the acquisition of commercial items (hereafter referred to as the “(b)(6) commercial item exemption”) so that the regulatory text is more consistent with the statutory text. Specifically, the proposed rule clarification will eliminate the detailed listing of permissible contract and subcontract types, and instead the revised provision will contain more generalized language that reads “contracts and subcontracts for the acquisition of commercial items,” which reflects the statutory text.

DATES: *Comment date:* Comments must be in writing and must be received by [**insert date 60 days from date of Federal Register publication**]

ADDRESSES: All comments to this proposed rule must be in writing. Electronic comments may be submitted in any one of three ways:

1. *Federal eRulemaking Portal:* Comments may be directly sent via <http://www.regulations.gov>
- a Federal E-Government Web site that allows the public to find, review, and submit

comments on documents that agencies have published in the *Federal Register* and that are open for comment. Simply type “(b)(6) commercial item exemption” (without quotation marks) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments;

2. *Email:* Comments may be included in an e-mail message sent to casb2@omb.eop.gov. The comments may be submitted in the text of the e-mail message or as an attachment;
3. *Facsimile:* Comments may also be submitted via facsimile to (202) 395-5105; or
4. *Mail:* If you choose to submit your responses via regular mail, please mail them to: Office of Federal Procurement Policy, 725 17th Street, NW, Room 9013, Washington, DC 20503, ATTN: Raymond J. M. Wong. Due to delays caused by the screening and processing of mail, respondents are strongly encouraged to submit responses electronically.

Be sure to include your name, title, organization, postal address, telephone number, and e-mail address in the text of your public comment and reference “(b)(6) commercial item exemption” in the subject line irrespective of how you submit your comments. Comments received by the date specified above will be included as part of the official record. Comments delayed due to use of regular mail may not be considered.

Please note that all public comments received will be available in their entirety at http://www.whitehouse.gov/omb/casb_index_public_comments/ and

<http://www.regulations.gov> after the close of the comment period. Accordingly, you should not include any information that you would object to being disclosed.

FOR FURTHER INFORMATION CONTACT: Raymond J. M. Wong, Director, Cost Accounting Standards Board (telephone: 202-395-6805; email: Raymond_wong@omb.eop.gov).

SUPPLEMENTARY INFORMATION

A. Regulatory Process – Changes to 48 CFR Part 9903

Rules, regulations, and standards issued by the CAS Board are codified at 48 CFR Chapter 99. This proposed rule concerns the amendment of a CAS Board regulation other than a Standard, and as such is not subject to the statutorily prescribed rulemaking process for the promulgation of a Standard at 41 U.S.C. 1502(c) [formerly, 41 U.S.C. 422(g)].

B. Background and Summary

The regulations implementing the statutory exemption from CAS requirements for the acquisition of commercial items are found at 48 CFR 9903.201-1(b)(6), which provide for an exemption from CAS for certain specified permissible contract types for the acquisition of commercial items, the “(b)(6) commercial item exemption.” Over the years, the wording of this implementing regulatory exemption has evolved as the permissible contract types for the acquisition of commercial items under the applicable statutory framework (i.e., Federal Acquisition Streamlining Act of 1994 (FASA), Federal Acquisition Reform Act of 1996 (FARA), Services Acquisition Reform Act of 2003 (SARA)) and corresponding regulations have changed. The CAS Board now believes that there is an inconsistency in the regulatory text of the (b)(6) commercial item exemption, as found in 48 CFR 9903.201-1(b)(6), compared to the description of this exemption and contract types as defined under other applicable statutory and

regulatory provisions. To correct this inconsistency, the CAS Board believes that the wording of section 4205 of the FARA, which amended the CAS authorizing statute to state CAS are not applicable to “[c]ontracts or subcontracts for the acquisition of commercial items,” might now be more appropriate to use in the regulatory text to define the permissible contract types for the acquisition of commercial items subject to the (b)(6) commercial item exemption. As described further below, the simplification and clarification of the regulatory text would eliminate the detailed listing of permissible contract and subcontract types subject to the commercial item exemption, for the more generalized phrase “contracts and subcontracts for the acquisition of commercial items,” which reflects the statutory text.

Historical Background

Below is a brief description of the applicable statutory provisions.

1994 – Federal Acquisition Streamlining Act (FASA) of 1994 (Pub. L. 103-355)

Section 8301(d) of the FASA contained a provision that exempted the following contracts from the CAS: (1) contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public; (2) contracts or subcontracts where the price negotiated is based on prices set by law or regulation; or (3) any other firm fixed-price (FFP) contract or subcontract (without cost incentives) for commercial items.

1996 – Federal Acquisition Reform Act (FARA) of 1996 (Pub. L. 104-106)

The FASA CAS exemptions were subsequently revised in section 4205 of the FARA. The FARA revised FASA's CAS exemptions by eliminating the FASA's third exemption (for FFP contracts without cost incentives) and revising the language of FASA's first exemption (for FFP contract based on catalog pricing) to read "[c]ontracts or subcontracts for the acquisition of commercial items." FARA did not make any changes to the second FASA exemption (for contracts based on prices set by law or regulation) (see 48 CFR 9903.201-1(b)(5)). The CAS Board had decided not to issue any rulemaking to implement the CAS exemptions as provided in the FASA because of it was certain that the FASA provisions would be superseded by these FARA provisions. The CAS Board implemented the CAS exemptions as provided in the FARA, as an interim rule on July 29, 1996 (61 FR 39360), and as a final rule on June 6, 1997 (62 FR 31294).

1996 CAS Board Rulemaking

The CAS Board's 1996 interim rule for the (b)(6) commercial item exemption largely reflected the FARA section 4205 statutory text, except for two differences. First, the draft regulatory text used "and" rather than "or" as stated in the statute, so the regulatory text read as "[c]ontracts and subcontracts for the acquisition of commercial items." Secondly, the CAS Board added the term "firm fixed-price" to the text so that the interim regulatory text, in its entirety, read as "[f]irm fixed-price contracts and subcontractors for the acquisition of commercial items" in the 1996 interim rule. To explain these additional terms in the preamble to its 1996 interim rule, the CAS

Board referred to 48 CFR Part 12, where section 12.207 of the Federal Acquisition Regulation (FAR) used “firm-fixed-price [FFP] contracts or fixed-price contracts with economic price adjustment [FPEPA] ... [and i]ndefinite-delivery contracts ... based on [FFP or FPEPA]” to describe the only contract types to be used for the acquisition of commercial items. This section of the FAR was written to implement FASA (60 FR 48231, September 18, 1995). Thus, while the intent of the CAS Board’s 1996 interim rule as expressed in the Federal Register preamble was to implement the FARA exemption for the acquisition for the acquisition of commercial items, the text of the interim rule reflected the more limited permissible contract types, as found in FAR 12.207, which had implemented the FASA permissible contract types for the acquisition of commercial items.

This was further complicated because FAR 12.207 implemented FASA with a slightly different definition of permissible contract types for the acquisition of commercial items than what was called for in that statute. Section 8002(d) of the FASA stated that, when acquiring commercial items, the “FAR shall include ... a requirement that firm, fixed-price [(FFP)] contracts or fixed price with economic price adjustment [(FPEPA)] contracts be used to the maximum extent practicable” and cost type contracts were prohibited. FAR 12.207, as amended by FASA, however, provided that: “[a]gencies shall use firm-fixed-price [(FFP)] contracts or fixed-price contracts with economic price adjustment [(FPEPA contracts)] for the acquisition of commercial items [the FASA text]. Indefinite-delivery contracts ... may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited.” This FAR implementation of FASA is more limiting than FASA itself because FFP and FPEPA contracts, as well as

indefinite-delivery contracts containing FFP and FPEPA provisions, could only be used, rather than be used to the maximum extent practicable per FASA (FAR Acquisition of Commercial Items, 60 FR 48231, September 18, 1995). Consequently, while the intent of the CAS Board's 1996 interim was to implement the FARA exemption from CAS for the acquisition of commercial items, the regulatory text reflected the more restricted interpretation of FAR 12.207, which in turn had implemented FASA and had done so in a more restrictive manner than required by that statute.

1997 CAS Board Rulemaking

When developing the 1997 final rule, the CAS Board decided to add FPEPA contracts as one of the permissible contract types for the acquisition of commercial items subject to the (b)(6) commercial item exemption. The CAS Board did so to address public comments that recommended the inclusion of the FPEPA contract as a permissible contract type for the acquisition of commercial items subject to the (b)(6) commercial item exemption; the CAS Board had received the public comments in response to the interim rule, which did not include FPEPA contracts in the listing of permissible contract types for the acquisition of commercial items exempted from CAS. While the CAS Board added the FPEPA contract type to the list in the final rule, however, it specifically excluded FPEPA contracts with economic price adjustments based on actual incurred costs for labor and materials. As explained in the preamble to the 1997 final rule, "[t]he [CAS] Board believes that this approach to [FPEPA] contracts comports with both the intent of the [FARA] statute and the [FARA] Conference Report by expanding the CAS [(b)(6)] commercial item exemption to [FPEPA] contracts in a manner that

will avoid the allocation of costs to cost objectives based on actual contractor incurred costs.”

The FARA Conference Report stated that the CAS Board should issue guidance, consistent with commercial accounting systems and practices, to ensure that contractors assigned costs appropriately to commercial item contracts, other than FFP commercial item contracts. In promulgating the final rule, however, the CAS Board chose not to issue this guidance, thinking that it was unnecessary as commercial item contracts are limited by regulation to the FFP and FPEPA contract varieties. Even while excluding FPEPA contracts with price adjustments based on actual costs incurred from the list of permissible contract types subject to the (b)(6) commercial item exemption, the CAS Board observed in the preamble to the 1997 final rule that Federal procuring agencies had stated that FPEPA contracts using actual costs incurred were rarely, if ever, used. The CAS Board noted that it would reconsider the need for guidance when other contract types for the acquisition of commercial items are authorized, or until another need for such guidance arises in the future.

2003 FAR Rulemaking

Subsequently, there have been changes in the applicable statutes and regulations on acquiring commercial items, which have broadened the scope of permissible contract types. First, FAR 12.207 was revised on March 18, 2003 (68 FR 13201), to allow the use of FFP contracts in conjunction with award fee incentives or performance or delivery incentives, when the award fee or incentive is based solely on factors other than cost. That is, permissible contract types could include certain fixed-price-incentive (FPI) contracts described in FAR Subparts 16.4 when the award fee or incentive is based solely on factors other than cost. The CAS Board notes that this

FAR expansion was consistent with FASA's section 8301(d), which had exempted "any other firm fixed-price contract or subcontract (without cost incentives) for commercial items."

However, despite the expansion in the FAR of permissible contract types for the acquisition of commercial items, the CAS Board did not revise, and has not revised, the (b)(6) commercial item exemption to reflect these additional FAR permissible contract types for the acquisition of commercial items.

2003 Services Acquisition Reform Act (SARA) of 2003 (Pub. L. 108-136)

Also, the SARA permitted the use of time-and-materials (T&M) contracts or labor-hour (LH) contracts for acquiring commercial services, subject to certain limitations. Accordingly, FAR 12.207 was revised to implement SARA on December 12, 2006 (71 FR 74667).

The CAS Board issued a final rule implementing SARA on July 3, 2007 (72 FR 36367), by incorporating T&M and LH contracts and subcontracts as additional contract types for the acquisition of commercial items subject to the (b)(6) commercial items exemption. During the public comment process leading up to the CAS Board's 2007 final rule, a possible discrepancy between the (b)(6) commercial item exemption and the permissible contract types specified at FAR 12.207 was noted. In particular, it was noted that there appeared to be permissible contract types within FAR 12.207 that might possibly be excluded under a literal reading of the (b)(6) commercial item exemption. For example, a literal reading of the term "FFP" contracts in the context of the (b)(6) commercial item exemption might exclude permissible FPI contracts (described in FAR Subpart 16.4) from the coverage of the (b)(6) commercial item exemption

when the award fee or incentive is based solely on factors other than cost. Such a literal reading of the term “FFP” contracts to exclude FPI contracts as permissible contract types covered by the (b)(6) commercial item exemption for the acquisition of commercial items was not the CAS Board’s intent. In the preamble to the 2007 final rule in response to the public comment, the CAS Board stated that it “did not deliberate this recommendation because it was outside of the scope of the proposed rule to provide an exemption for T&M/LH contracts” and that the recommendation will be considered in the formulation of future agenda items. In fact, the CAS Board had indicated in the preamble to its FR notice for the 1997 final rule which implemented FARA (62 FR 31294, June 6, 1997) that it would reconsider the need for guidance if additional contract types for the acquisition of commercial items were authorized in the future.

2012 CAS Rulemaking

Accordingly, the evolution and expansion of the scope of the permissible contract types for acquiring commercial items has resulted in an inconsistency between the wording of the (b)(6) commercial item exemption, as found in 48 CFR 9903.201-1(b)(6), and the permissible contract types as described in the applicable statutes (i.e., FASA, FARA, SARA) and their implementing regulations. To correct this confusion, the CAS Board believes the wording of FARA’s section 4205, “[c]ontracts or subcontracts for the acquisition of commercial items,” might now be more appropriate for the text of the (b)(6) commercial item exemption, as provided at 48 CFR 9903.201-1(b)(6). Using the generalized phrase “contracts and subcontracts for the acquisition of commercial items,” obviates the continuing need to update and keep current a detailed listing of permissible contract types for the acquisition of commercial items, which continues to evolve

with the passage of time. Furthermore, the CAS Board notes that this FARA text is the plural version of the statutory commercial item exemption outlined in the CAS Board's authorizing statute at 41 U.S.C. 1502(b)(1)(C)(i) (a result from the 2011 recodification of Title 41 of the U.S. Code), and is identical to the text in that section's predecessor, 41 U.S.C. 422(f)(2)(B)(i), prior to the Title 41 recodification.

Additionally, this proposed rule would result in the removal of the exclusion of FPEPA contracts with economic price adjustments based on actual incurred costs for labor and material from the permissible contract types for the acquisition of commercial items subject to the (b)(6) commercial item exemption. The proposed elimination of the exclusion for such FPEPA contracts from the list of permissible contract types for the acquisition of commercial items to which the (b)(6) commercial item exemption is applicable means that such FPEPA contracts will be exempted from CAS under the proposed (b)(6) commercial item exemption. The CAS Board believes this change is supported by several factors. First, it is not certain that this contract type can be used for acquiring commercial items in light of the FASA prohibition on the use of cost type contracts. Second, even if FPEPA contracts are used, FAR 16.203 contains restrictions and procedural controls that significantly limit the government's risk even if CAS is not applicable. For example, FAR 16.203-4(c) requires that the contracting officer specify within the contract, in a clause substantially the same as at FAR 52.216-4 Economic Price Adjustment – Labor and Material: (i) the types of labor and materials subject to adjustment under the clause; (ii) the labor rates (including fringe benefits, if any) and unit prices of materials that may be increased or decreased; (iii) the quantities of the specified labor and materials allocable to each unit to be delivered under the contract; and (iv) not include any indirect cost (except for fringe benefits

specified in the contract Schedule) or profit in any price adjustment. In view of these limitations and controls, the CAS Board does not presently find any substantive benefit from applying CAS to FPEPA contracts with economic price adjustments based on actual incurred costs for labor and material. While proposing to eliminate this exclusion of such FPEPA contracts from the list of permissible contract types for the acquisition of commercial items covered by the (b)(6) commercial item exemption, and thereby making such FPEPA contracts covered by the CAS exemption, the CAS Board nonetheless reserves the right to reinstate the exclusion of certain FPEPA contracts from the list of permissible contract types for the acquisition of commercial items covered by the (b)(6) commercial item exemption from CAS should circumstances warrant.

In sum, the CAS Board believes that, as a general rule, the government benefits from CAS on those contracts whose price is based on actual incurred costs. At the present time, under the present framework of statutes and regulations governing the acquisition of commercial items, contracts based on actual incurred costs cannot be used (except for T&M and LH contracts and, as previously noted, possibly a certain type of FPEPA contract). If the legal framework was expanded to include additional permissible contract types, the CAS Board will reconsider the scope of the (b)(6) commercial item exemption, in accordance with its authority to apply CAS, in whole or in part, in such circumstances as it deems appropriate.

C. Conclusion

Therefore, in order to clarify the exemption found at 48 CFR 9903.201-1(b)(6) for contracts or subcontracts used for the acquisition of commercial items, the CAS Board proposes changing the wording of this regulatory text from “[f]irm fixed-priced, fixed-priced with economic price adjustment (provided that price adjustment is not based on actual costs incurred), time-and-materials, and labor-hour contracts and subcontracts for the acquisition of commercial items” to read: “[c]ontracts and subcontracts for the acquisition of commercial items,” thereby eliminating the detailed listing of permissible contract types for the acquisition of commercial items exempted from CAS, as well as the current exception to the list of permissible contract types for the (b)(6) commercial item exemption from CAS for the FPEPA contract type with the price adjustments based on actual costs incurred.

D. Public Comments

Interested persons are invited to participate by submitting data, views or arguments with respect to this proposed rule. As detailed in the Background and Summary part of this proposed rule, the CAS Board is proposing to clarify and simplify the (b)(6) commercial item exemption from CAS to read as “[c]ontracts and subcontracts for the acquisition of commercial items.” Doing so would eliminate the current listing of permissible contract types for the (b)(6) commercial item exemption, as well as the exception to that exemption for the FPEPA contract type with price adjustments based on actual incurred costs. The proposed elimination of the exception to the (b)(6) commercial item exemption would mean that the FPEPA contract type with price adjustments based on actual incurred costs would be exempted from CAS under the proposed (b)(6) commercial item exemption. With regard to the proposal to exempt from CAS coverage

FPEPA contracts with economic price adjustments based on actual incurred costs for labor and material, the CAS Board notes that this proposal is made based on the assumption that this particular FPEPA contract type is not used for acquiring commercial items. Contract information, however, was not readily available to validate this assumption. As part of the public comment process, the CAS Board specifically requests comments on this usage assumption and any information on the use of this particular FPEPA type contract for acquiring commercial items.

E. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35, Subchapter I) does not apply to this rulemaking, because this proposed rule will impose no paperwork burden on offerors, affected contractors and subcontractors, or members of the public which requires the approval of OMB under 44 U.S.C. 3501, et seq. The purpose of this rule is to clarify the exemption at 48 CFR 9903.201-1(b)(6) for contracts or subcontracts for the acquisition of commercial items by eliminating the detailed listing of permissible contract types so that it is more consistent with the statutory text at section 4205 of the Federal Acquisition Reform Act of 1996 which amended the CAS authorizing statute to state CAS is not applicable to “[c]ontracts or subcontracts for the acquisition of commercial items.” In addition, this proposal is consistent with the intent of the objectives of the “Streamlined Applicability of Cost Accounting Standards” set forth in Section 802 of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65).

E. Executive Order 12866, the Congressional Review Act, and the Regulatory Flexibility Act

This proposed rule will serve to clarify the elimination of certain administrative requirements associated with the application and administration of the Cost Accounting Standards by covered Government contractors and subcontractors, consistent with the provisions of Section 4205 of the Federal Acquisition Reform Act of 1996. The economic impact on contractors and subcontractors is, therefore, expected to be minor. As a result, the Board has determined that this proposed rule will not result in the promulgation of an “economically significant rule” under the provisions of Executive Order 12866, and that a regulatory impact analysis will not be required. For the same reason, the Administrator of the Office of Information and Regulatory Affairs has determined that this proposed rule is not a “major rule” under the Congressional Review Act, 5 U.S.C. Chapter 8. Finally, this rule does not have a significant effect on a substantial number of small entities because small businesses are exempt from the application of the Cost Accounting Standards. Therefore, this rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980, 5 U.S.C. Chapter 6.

List of Subjects in 48 CFR Part 9903

Cost accounting standards, Government procurement.

Joseph G. Jordan

Chair, Cost Accounting Standards Board

For the reasons set forth in this preamble, chapter 99 of Title 48 of the Code of Federal Regulations is proposed to be amended as set forth below:

PART 9903 – CONTRACT COVERAGE

1. The authority citation for Part 9903 continues to read as follows:

Authority: Public Law 111-350, 124 Stat. 3677, 41 U.S.C. 1502.

2. Section 9903.201-1 is amended by revising paragraph (b)(6) to read as follows:

9903.201-1 CAS applicability.

* * * * *

(b) * * *

(6) Contracts and subcontracts for the acquisition of commercial items.

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